Supreme Court, U.S.
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90-1731

No.

IN THE

Supreme Court of the United States

October Term, 1990

GRACE PULITANO MANNINO,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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(6288—LC3-467)

QUESTIONS PRESENTED FOR REVIEW

Whether the Government's failure to contemporaneously minimize intercepted communications or to inform the Court during the wiretaps that minimization would have to wait precluded their admission into evidence?

LIST OF ALL PARTIES TO THE PROCEEDING IN THE THIRD CIRCUIT COURT OF APPEALS*

United States of America, Appellee

Francesco Gambino, Appellant in No. 89-2087

Ignazio Antonino Mannino, Appellant in No. 89-2088

Emannuele Salvatore Mannino, Appellant in No. 89-2089

Grace Pulitano Mannino, Appellant in No. 89-2090

Enzo Varisco, Appellant in No. 90-1034

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* Petitioner anticipates that co-defendants will also petition for a Writ of Certiorari Pursuant to Rule 19.4. Petitioner joins in the petitions of her co-defendants.

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In The

SUPREME COURT OF THE UNITED STATES

Term, 1990

GRACE PULITANO MANNINO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the District Court in certain pre trial matters was published as United States v. Gambino, 728 F.Supp. 1150 (E.D. Pa., 1989).

The opinion of the Trial Court concerning the issue of minimization appears in Appendix A1 et seq.

The opinion of the Court of Appeals captioned as United States of America v. Gambino, ___ F.2d ___ (3rd Cir. 1991), appears in Appendix B7, et seq.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1). The Third Circuit Court of Appeals affirmed Petitioner's conviction and Sentence on March 4, 1991. (A7)

CONSTITUTION AND STATUTES INVOLVED

UNITED STATES CONSTITUTION

AMENDMENT IV - SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches

and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

TITLE 18 UNITED STATES CODE SECTION 2518(5) and (6)

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer

than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(6) Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at

such intervals as the judge may require.

STATEMENT OF THE CASE

Petitioner, Grace Pulitano Mannino, was charged with conspiracy to import heroin, 21 U.S.C. sec. 963, conspiracy to distribute heroin, 21 U.S.C. sec. 846, conspiracy to distribute cocaine, 21 U.S.C. sec. 846, and money laundering, 18 U.S.C. sec. 1956(a)(1).

Petitioner was tried to a jury with co-defendants, Francesco Gambino, Ignazio Antonino Mannino (her husband), Emanuele Salvatore Mannino, Enzo Varisco and Carlo Fodera, before the Honorable Louis C. Bechtle, U.S.D.C.J., from July 21, 1989, through September 7, 1989. Petitioner was convicted of conspiracy to import heroin and money laundering.

On December 13, 1989, Petitioner was sentenced to concurrent terms of one year

and one day on counts one, two and seven, and a 15 year period of supervised release. Additionally, the Court imposed a fine of $10,000. The Trial Court granted Petitioner bail pending appeal.

On March 4, 1991, the Court of Appeals affirmed her conviction. She is on bail and the Court of Appeals has stayed the mandate pending disposition of her Petition provided same is filed by April 24, 1991.

Petitioner lived with her husband in Pennsylvania. Pursuant to an FBI investigation, their home telephone was tapped. At her trial, the Government introduced telephone calls made to her house and the testimony of co-conspirators who had agreed to plead guilty and cooperate with the Government by testifying against her in return for reduced sentences. Significantly, when the Government adduced

testimony from its cooperating witnesses no testimony was given by them concerning Petitioner. They had no conversations with her and indeed were unaware of her existence. The theory of the Government's case against her was that she acted as a clearing house for messages from various co-conspirators to her husband. In its attempt to prove this theory, the Government introduced recordings of wire tapped conversations made by various people to the Mannino home. Since petitioner is a housewife with three children, and at the time had a newborn, she was always at home and aways answered the phone when it rang.

The wire tapped conversations of Petitioner were in the Sicilian dialect of the Italian language. The Mannino wiretap was extended several times and

lasted about six months. Most, if not all of the intercepted conversations were minimized after the fact. No Judge was ever advised during the course of the interceptions in any of the Court ordered seven day reports that there was any problem concerning contemporaneous minimization using Sicilian fluent translators.

A hearing was conducted to determine if the statutory requirement of minimization had been violated. The FBI case agent testified that the investigation was code named Iron Tower. It targeted narcotics trafficking by alleged members and associates of the Sicilian Mafia. The case was initiated in March of 1986. Despite the fact that it was anticipated that many conversations would be in the Sicilian dialect only one translator was employed. No attempt was made to hire

additional translators until a point had been reached where additional resources would be needed. Therefore, the Government conceded that most, if not all conversations were minimized after the fact.

The agent was responsible for preparing seven day reports submitted to the Court in conjunction with electronic interception. He admitted that he did not advise the Court with regard to the interceptions that no simultaneous minimization was occurring. Ultimately, it was stipulated by the Government that no Judge was advised in any seven day report of any problem with regard to Sicilian translators.

REASONS FOR GRANTING THE WRIT

POINT I

WIRETAPPED CONVERSATIONS NOT CONTEMPORANEOUSLY MINIMIZED WITHOUT GOOD CAUSE MUST BE SUPPRESSED IN THEIR ENTIRETY.

From its inception, this investigation targeted Sicilian speaking and bilingual alleged members and associates of the Sicilian Mafia. Therefore, it was reasonably foreseeable that many conversations would be spoken in Sicilian. In United States v. Adamita, 88 Cr. 217 S.D.N.Y., the Honorable John Sprizzo, presented with similar facts, ordered the suppression of a number of tapes because of a failure to minimize. Yet, applying the same statute to virtually identical facts, the Court in the instant case failed to suppress!

It has been stated that the requirements of the Fourth Amendment can not be

forgiven in the name of law enforcement. Berger v. New York, 388 U.S. 41, 62 (1967). Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices. Although Title III of the Omnibus Criminal Control and Safe Street Act of 1968 (18 U.S.C. Sec. 2510 et. seq.) authorizes a Court to order the interception of wire and oral communications, responsible officials, including judicial officers, must take care to insure that searches are conducted in a manner that minimizes unwanted intrusions upon privacy. Andresen v. Maryland, 427 U.S. 463, 482 n. 11 (1976).

Title III as amended by the passage of Pub.L. 99-508. Section 106(c) added provisions relating to minimization where the intercepted communication is in code or foreign language. Specifically,

the Amendment provides that where an expert in that foreign language or code is not reasonably available during the interception period, minimization may be accomplished as soon as practicable after such interception. 18 U.S.C. sec. 2518 (5).

The Third Circuit had stated in previous cases, that the minimization requirement is satisfied if, on the whole, the Government has shown a high regard for the right of privacy by doing all that they reasonably could to avoid unnecessary intrusion. United States v. Armocida, 515 F.2d 29, 42 (3rd Cir. 1975).

In the instant case, the Government exhibited no regard for the privacy rights of Petitioner as evidenced by the lack of candor the Government displayed to the supervising court. It was stipulated, at the close of the suppression

hearing, that the Trial Court had never been advised of the lack of minimization occurring in this case. The Agent who was responsible for drafting the seven day reports submitted to the Court during the course of the execution of the interception orders, never took the time or the trouble to advise the Court that translators could not be contacted or hired to assist in the minimization process. Instead, the agent assumed that his conferences with attorneys in the United States Attorney's Office were sufficient to demonstrate compliance with minimization requirements. Obviously, they were not since the United States Attorney never informed the Court either of the lack of contemporaneous minimization.

The Government took few, if any, steps to ascertain the availability and

eligibility of interpreters in the Sicilian language. Although several agents testified during the course of the trial that they had expertise in Sicilian, these agents were never contacted by the case agent to ascertain their availability to assist in the monitoring of the numerous wire taps and bugs which had been placed by the Government. Petitioner argues that such lack of effort hardly constitutes substantial compliance with the minimization requirements of Title III.

Indeed, the Government's conduct in failing to contemporaneously minimize ignored the mandate of Title III's requirements and violated the Fourth Amendment prohibition against general searches. The record below established that a high percentage of the calls which were intercepted were unrelated to, and beyond the

scope of, the wiretap warrant. Literally thousands of conversations were intercepted and only about 400 of them were offered into evidence by the prosecution. No rationale justified the repeated, intentional, trespassory intrusions into the Petitioner's constitutionally protected area of privacy. For example, the conversations of children were regularly intercepted during the course of the implementation of these orders, and non-pertinent conversations were frequently referred to in order to assist in identification. By committing numerous unjustified intrusions into the sanctity of the Petitioner's privacy, the Government ignored the specific and unique directives of the warrants authorizing electronic surveillance. Berger v. State of New York, supra.; United States v. Heldt, 688 F.2d 1238, 1253 (D.C. Cir. 1981).

The conduct of the Government herein was more than mere isolated instances of excessive monitoring which would clearly not require suppression. Rather, the continuous and pervasive acts of over monitoring and non minimization were a clear violation of the law. Compare, Scott v. United States, 436 U.S. 128 (1978) where this Court found execution of the interception orders to have been reasonable under the circumstances. See also, United States v. Armocida, supra., 515 F.2d 29, 43.

In Armocida, the Court noted several factors which were relevant to a determination of whether there had been substantial compliance with the statute. Specifically, the Court pointed to the nature and scope of the criminal enterprise under investigation, the Government's reasonable expectation as to the

character of, and the parties to, the conversation and the degree of supervision by the authorizing judge. United States v. Armocida, supra., 515 F.2d at 44.

In Petitioner's case, the Government was very well aware of the nature and scope of the criminal enterprise under investigation at the time it made its application for the warrants which were issued in this case. As evidenced by the early applications in this case, the Government was relying upon information which it had gathered in prior cases to describe the nature and scope of the alleged instant conspiracy. Thus, the Government was able to describe this case as a widespread narcotics conspiracy involving, in part, persons of Sicilian extraction as well as others. The Government was able to identify many

targets of the investigation at the point it applied for these warrants. The Government knew at the time that it made its application that many of the individuals in this case would speak in the Sicilian dialect. Thus, unlike Scott v. United States, supra., the nature and scope of the criminal enterprise was already ascertained by the Government. And, the Government not only had a reasonable expectation as to the character of and the parties to the conversations but to a great extent knew the identities of many of the parties to the conversations and thought it knew the character of those conversations. Finally, it is conceded by the Government that, with regard to the minimization requirement, there was utterly no supervision by the Court below.

Petitioner submits that the Government failed to meet its burden of proving its conduct avoided unnecessary intrusions and that its conduct resulted in no greater invasion of privacy than was necessary under the circumstances. United States v. Armocida, supra., 515 F.2d at 43. The Government's flagrant and willful disregard of the Fourth Amendment Rights of Petitioner demanded suppression of all evidence seized as a result of the execution of the wire tapped orders, and any evidence derivatively obtained.

Although this Court in Scott v. United States, supra., 436 U.S. 128, specifically declined to define the scope of suppression for failing to minimize, many Courts have agreed that total suppression of all intercepted conversations is mandated when the

violation of statutory requirements of minimization is flagrant. See, United States v. Santora, 600 F.2d 1317, 1320 (9th Cir.), modified, 609 F.2d 433 (9th Cir. 1979); United States v. Hyde, 574 F.2d 856, 869 5th Cir., reh. and reh. en banc den., (5th Cir. 1978); United States v. Turner, 528 F.2d 143, 156 (9th Cir.), cert. den. sub. nom., Grimes v. United States, 423 U.S. 996 (1975), and sub. nom., Hackett v. United States, 429 U.S. 837 (1976); United States v. Suquet, 547 F.supp. 1034, 1039 (N.D. Ill. 1982); United States v. Webster, 473 F.supp. 586, 598 (D. Md. 1979) aff'd. in part, rev'd. in part on other grounds, 639 F.2d 185 (4th Cir. 1982), cert. den. 456 U.S. 935 (1982); United States v. Curreri, 363 F.Supp. 430, 437, (D. Md. 1973), United States v. Lanza, 349 F.Supp. 929, 932 (M.D. Fla. 1972); United States v. Leta,

332 F.Supp. 1357, 1360 n. for (M.D. Pa. 1971). Some Courts have gone further and required the total suppression of all communications whenever the minimization requirement is violated. United States v. Focarile, 340 F.Supp. 1033, 1047 (D.Md.), aff'd. sub. nom., United States v. Giordano, 469 F.2d 522 (4th Cir. 1977), aff'd. on other grounds, 416 U.S. 505; United States v. Scott, 331 F. Supp. 233, 248 (D.C. Cir. 1971), vacated on other grounds, 504 F.2d 194 (D.C. Cir. 1974); People v. Brenes, 42 N.Y.2d 41, 49-50, 396 N.Y.S. 2d 629 (1977); State v. Cantania, 85 N.J. 418, 426, 427 A.D. 537 (1981).

The reasons requiring total suppression in this case are manifest. First, is the need for an effective detriment to the unlawful conduct of wire taps. Congress recognized the need to articulate

the prohibition of the use of any oral communication intercepted in violation of Title 3. See, U.S.C. sec. 2515. Second, when Courts fail to suppress, they ignore the exceptional dangers inherent in electronic surveillance. Berger v. New York, supra. Third, is the traditional reluctance of any court to accept as evidence material seized in direct disregard of the statute. Fourth, were Courts to suppress selectively on an item by item basis, it would make minimization requirements under the statute illusory. As stated in United States v. Focarile, supra.:

> "In this Court's opinion the minimization requirement of Section 2518(5) would be illusory if it were enforced on an item by item basis by means of suppressing unauthorized seizures at trial after interception is a fait accompli. Minimization as required by the statute must be employed by the

> law enforcement officers during the wire tap, not by the Court after the wire tap ... Knowing that only "innocent" calls would be suppressed, the Government could intercept every conversation during the entire period of a wire tap with nothing to lose by doing so since it would use at trial only those conversations which had definite incriminating value anyway, thereby completely ignoring the minimization mandate of Title III. A conversation once seized can never truly be given back as could a physical object. The right of privacy protected by the Fourth Amendment has been more invaded when a conversation which can never be returned has been seized then where a physical object which can be returned has been seized."

See, United States v. Scott, 331, F.Supp. 233, 246-249 (B.D.C. 1971); United States v. Leta, 332 F.Supp. 1357, 1360 note for (M.D. Pa. 1971).

Fifth, the purpose of the minimization requirement is to prevent a wire tap

from turning into a "general search and wholesale invasion of privacy." United States v. King, 335 F.Supp. 523, 544-545 (S.D. Cal. 1971), aff'd. in part, rev'd. in part on other grounds, 478 F.2d 494 (9th Cir.), cert. den. sub. nom., Light v. United States, 414 U.S. 846 (1973). The overhearing of telephone conversations by interception, like a search of documents, poses an inherent danger of turning into a general search, due to the difficulty of ascertaining the relevance of the item to be "seized." Where disregard of a warrant's limitations is flagrant and entire, the otherwise valid warrant may become a general one, in which case the fruits of the search must be suppressed. United States v. Heldt, 669 F.2d 1238, 1259 (D.C. Cir. 1981); See, United States v. Sequet, 547 F.Supp. 1034, 1039-1043 (N.D. Ill. 1982); United

States v. Adamita, 88 Cr. 217 (S.D.N.Y. 1989).

Failure to minimize in the instant case violated Petitioner's Fourth Amendment Rights. The decision below by the Third Circuit ignored its own precedent as well as that of other circuits. As such, its departure calls for an exercise of this Court's power of supervision. Moreover, the refusal of the Third Circuit to reverse the District Court on minimization is in conflict with this Court's decision in Scott v. United States, supra., 436 U.S. 128.

CONCLUSION

As Justice Jackson once wrote, "There is, of course, strong temptation to relax rigid standards when it seems the only way to sustain convictions of evildoers." Krulewitch v. United States,

336 U.S. 440, 457, 69 S.Ct. 716, 725, 93 L.Ed. 790 (1949) (Jackson, J., concurring). This is especially true where the conviction is for a narcotics violation at a time when the country is engaged in a "war on drugs". However, a courtroom is not the proper place in which to fight such a "war." A defendant charged with a narcotics violation is presumed like every other defendant to be innocent until proven guilty beyond a reasonable doubt after a fair trial.

United States v. Eduardo Franco, 885 F.2d 1003, 1011 (2nd Cir. 1989).

This Court should grant this petition for certiorari because the Third Circuit Court of Appeals has incorrectly decided an important question of federal law (whether failure to contemporaneously minimize wire tapped conversation and so

inform the supervising court violated 18 U.S.C. 2518(5)) which requires resolution by this Court, particularly as the decision below directly conflicts with applicable decisions of this Court. See R. 17.1(c).

Respectfully submitted,

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SUPERSEDING MEMORANDUM ORDER DENYING MOTION TO SUPPRESS INTERCEPTED COMMUNICATIONS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL
v.	:	
FRANCESCO GAMBINO	:	No. 89-00003-01
and		
IGNAZIO ANTONINO MANNINO	:	-03
and		
EMANUELE SALVATORE MANNINO	:	-04
and		
ENZO VARISCO	:	-09
and		
CARLO FODERO	:	-10
and		
GRACE PULITANO MANNINO	:	-13

MEMORANDUM ORDER

AND NOW, TO WIT this 28th day of August, 1989, presently before the court is the motion of defendant Francesco Gambino to suppress electronic surveillance evidence for failure to comply with the minimization requirements of 18 U.S.C. Section 2518(5). For the reasons stated herein, defendant's motion is denied.1

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1. This Memorandum Order supersedes the court's prior Memorandum Order dated July 19, 1989 insofar as it replaces the reference in footnote 2, redesignated footnote 3, to Salvatore Caruso with Simone Zito, the proper target of the government intercept. Additionally, this Memorandum Order hereby applies to all defendants in this case, as requested by counsel at the hearing of July 7, 1989. Consequently, all references in the text to defendant Francesco Gambino are deemed to apply to all of the above-captioned defendants.

Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. Section 2510, et seq., permits the government to conduct limited electronic surveillance of the target of an investigation after judicial authorization based on a showing: (a) that probable cause exists to believe that the person whose communication will be intercepted has committed, is committing, or is about to commit a crime; (b) that probable cause exists to believe that incriminating communications will be intercepted; (c) that less intrusive investigative techniques have failed, probably would fail, or are too dangerous; and (d) that probable cause exists to believe that the place to be monitored is used or is about to be used or is leased to, or listed in the name of, or commonly used by the suspect. 18 U.S.C. Section 2518(3). One restriction on the wholesale use of wiretapping is the "minimization" requirement found in 18 U.S.C. Section 2518(5), which reads, inter alia,:

> Every order [authorizing electronic interception] and extension thereof shall...be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter....In the event the inter-

> cepted communication is in a code or a foreign language, and an expert in that foreign language or code is not reasonably available during the interception period, minimization may be accomplished as soon as practicable after such interception....

The United States Supreme Court has recognized that the minimization requirement under 18 U.S.C. Section 2518(5) manifests a balancing between the government's investigative needs and the individual's right to privacy under the Fourth Amendment. See Scott v. United States, 436 U.S. 128, 130 (1978).

Defendant Francesco Gambino claims that the government violated its obligations under U.S.C. Section 2518(5) by conducting "post-interception minimization",2 despite the fact that the government knew that most of the

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2. "Post-interception minimization" consists of the recording of all Sicilian conversations. The tapes are then turned over to a government-approved translator, in this case Federal Bureau of Investigation Agent Steven Salvo, where only conversations pertinent to the investigation are translated. This procedure is juxtaposed to simultaneous minimization, where a Sicilian language specialist would monitor conversations contemporaneous with their interception and would simply deactivate the listening device during nonpertinent conversations. At a hearing on defendant's motion conducted on July 7, 1989, Agent Salvo, and F.B.I. Agent Paul Hayes, testified that both post-interception and simultaneous minimization were conducted during the investigation of defendant Gambino.

potential intercepted conversations would be in the Sicilian dialect of the Italian Language.3 Defendant contends that this knowledge required the government to have Sicilian translators monitor all conversations simultaneous to their interception. The court does not agree.

In Scott v. United States, supra, the Supreme Court adopted the holding of the United States Court of Appeals for the District of Columbia that "an assessment of the reasonableness of the efforts at minimization [ ] requires an evaluation of the reasonableness of the actual interceptions in light of the purpose of the wiretap and the totality of the circumstances..." 436 U.S. at 131. At the hearing on defendant's motion, Federal Bureau of Investigation Agent Paul Hayes, the case agent in this investigation,

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3. Defendant Gambino challenges orders of April 16 and May 16, 1986 authorizing interception of the home telephone and automobile of Simone Zito, an order of July 9, 1987, authorizing the interception of the home telephone of co-defendant and fugitive Simone Zito, and an order of September 15, 1986 authorizing audio and visual interception at Leo's Pizza Palace in Pitman, New Jersey, an establishment owned by defendant Gambino.

testified that all government personnel monitoring the surveillance were given both oral and written instructions on minimization and that all conversations in English were simultaneously minimized. In addition, Special Agent Steven Salvo of the F.B.I., the government's expert translator and a native Sicilian speaker, testified that he conducted simultaneous minimization on ninety percent (90%) of the conversations intercepted from the automobile of Salvatore Caruso. Consequently, defendant Gambino's motion is limited to the remaining interceptions4 where simultaneous minimization was, at most, de minimis.

Agent Salvo testified that he conducted post-interception minimization on each intercepted communication. He stated that he would listen to the intercepted conversations on reel-to-reel tapes. Conversations which he deemed pertinent to the investigation would be translated into English and transcribed. When Agent Salvo encountered a conversation which

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4. See supra note 2.

he believed was not authorized by court order, he would fast forward the tape to the next conversation, using the tape's counter as a guide. This procedure was recorded on entry logs indicating which conversations were translated and which were minimized. Agent Hayes testified that this procedure was necessary to allow Agent Salvo to translate numerous other intercepts authorized under this broad investigation into international narcotics trafficking.5 Given the government's limited resources in this area, the court believes that the government sustained its burden under 18 U.S.C. Section 2518(5).

To begin with, it must be noted that Section 2518(5) does not "prohibit the interception of all nonpertinent conversations; rather it requires the government to conduct the wiretap so as

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5. Agent Hayes testified that the government contacted language schools in the Philadelphia area in an attempt to hire additional persons fluent in both English and Sicilian. These efforts were unsuccessful. Consequently, Agent Salvo was the only full-time Sicilian translator assigned to this investigation, which eventually resulted in a nineteen defendant, twenty-one count indictment.

to minimize the interception of such calls." United States v. Armocida, 515 F.2d 29, 42 (3d Cir.), cert. denied, 423 U.S. 858 (1975) (emphasis in original). See also Scott, supra, 436 U.S. at 140. Moreover, the statute itself provides for post-interception minimization where conversations are conducted in code or in a foreign language and where "an expert in that foreign language...is not reasonably available during the interception period." 18 U.S.C. Section 2518(5). Defendant contends that this provision is limited to unanticipated and extemporaneous instances where foreign language conversations are intercepted. Although this is certainly one of the examples contemplated by the statute, it is certainly not the only one.

The court believes that the government's testimony outlining their inability to procure additional Sicilian language translators who were willing to cooperate in the investigation and who could pass the requisite security clearances, in combination with the latitude extended to the government where the purpose of the wiretap was to investigate a large

scale drug conspiracy involving multiple parties whose identities were uncertain, and where the conversants frequently spoke in a foreign language and code and the range of activity included apparently legitimate business calls, see, e.g., Scott, supra, 436 U.S. at 140-42; United States v. Chavez, 533 F.2d 491, 494-95 (9th Cir.), cert. denied 426 U.S. 911 (1976), established that simultaneous minimization was "reasonably unavailable" and that the government's efforts were sufficient to meet their burden of minimization under the totality of the circumstances. The post-interception minimization procedures used by Agent Salvo were thorough, and limited the government's intrusion into Mr. Gambino's privacy to both a statutory and constitutionally acceptable degree. Defendant's motion to suppress is therefore denied.

SO ORDERED

LOUIS C. BECHTLE, J. /S

Filed March 4, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 89-2087, 89-2088, 89-2089,
89-2090 and 90-1034

UNITED STATES OF AMERICA

v.

FRANCESCO GAMBINO,
Appellant in No. 89-2087

IGNAZIO ANTONINO MANNINO,
Appellant in No. 89-2088

EMANUELE SALVATORE MANNINO,
Appellant in No. 89-2089

GRACE PULITANO MANNINO,
Appellant in No. 89-2090

ENZO VARISCO,
Appellant in No. 90-1034

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal Nos. 89-00003-01, 89-00003-02,
89-00003-04, 89-00003-12 & 89-00003-08)

Argued September 17, 1990

Before: SCIRICA, ALDISERT and
HIGGINBOTHAM*, *Circuit Judges*

(Filed March 4, 1991)

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* Since the date of argument Judge Higginbotham has assumed senior status.

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OPINION OF THE COURT

SCIRICA, *Circuit Judge.*

Defendants appeal their jury convictions of conspiracy to import and distribute heroin (21 U.S.C. §§ 963, 846) and money laundering (18 U.S.C. § 1956(a)(1)). We will affirm.

I.

Francesco Gambino supervised the importation and distribution of heroin from Italy to the New York-New Jersey area from 1985 to 1988. The scheme was coordinated by Antonio ("Tony") Mannino and Simone Zito, with assistance from Tony Mannino's brother Salvatore ("Sal") Mannino, Tony Mannino's wife Grace Mannino, and Simone Zito's brother Stefano Zito. Enzo Varisco was one of the conspiracy's cocaine distributors.[1]

Before addressing defendants' contentions, it is necessary to recite the facts in some detail and in particular the background and role of William

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1. Francesco Gambino, Tony Mannino, Sal Mannino, and Grace Mannino were convicted of conspiring to import and distribute heroin (21 U.S.C. §§ 963, 846), Sal and Grace Mannino were convicted of money laundering (18 U.S.C. § 1956(a)(1)), and Enzo Varisco was convicted of conspiring to distribute cocaine (21 U.S.C. § 846).

Kane, an FBI informant and the government's most significant witness. Kane ran an illegal video poker business in New York City with Giuseppe "Joe" Gambino, and operated out of the Cafe Giardino in Brooklyn, owned by Joe Gambino. Through his illegal business, Kane became involved with the defendants in this case.

In October 1986, however, Kane became a confidential informant for the FBI. In 1986 and 1987, Kane was introduced to Simone Zito and Tony Mannino, and later to Simone Zito's brother, Stefano Zito. Stefano Zito and Kane became friends. In 1987, Stefano told Kane that he, his brother Simone Zito, and Tony Mannino were members of the Mafia and that they were importing heroin into the United States. Stefano told Kane that Tony's brother Sal Mannino was then in Sicily, arranging for an exchange of heroin for cocaine. FBI interceptions of telephone conversations confirmed that Sal Mannino was in Sicily at the time.

Working with the FBI, Kane began to participate in the conspirators' illegal activities. Because neither Simone nor Stefano Zito had any legitimate source of income, Kane carried them on the payroll of his video game company and arranged financing for their automobiles. Kane soon moved on to more direct involvement in the conspiracy.

In October, 1987, Simone Zito told Kane that he wanted to purchase a townhouse, as an investment and as a place to cut heroin, but that all his money was tied up in heroin. After first discussing a possible loan, Simone agreed, in a tape-recorded conversation, to sell Kane seven ounces of heroin for $25,000. That conversation also revealed some of the details of Simone Zito's relationship with Tony Mannino. Kane mentioned

that he did not want anyone to know about the transaction, not even Tony Mannino. Zito responded that "me and Tony's the same person."

Simone Zito delivered the heroin to Kane later that evening. The next day, Kane paid Simone Zito the $25,000. Tony Mannino accompanied Zito to that meeting, and afterwards Kane, Mannino and Zito discussed further heroin sales. In the course of these discussions, Kane mentioned that his boss in the drug trade was Joe Gambino. Mannino responded that his and Simone Zito's boss in the drug trade was Francesco Gambino.

On several other occasions, Simone Zito and Kane discussed further heroin transactions both in recorded and unrecorded conversations. In March or April 1988, the two had a conversation in the Cafe Giardino which significantly corroborated Mannino's earlier statement that he and Simone Zito worked for Francesco Gambino. Zito offered to sell Kane a kilogram of heroin on the spot. Kane, who was not able to purchase drugs without FBI authorization but did not want to seem disinterested, countered with a much lower offer. At that point, Simone Zito walked to the rear of the cafe, out of Kane's sight, then returned with the information that the price was negotiable, and that Kane could take a sample home to New Jersey. Shortly afterward, Kane determined that the only two people in the cafe, other than himself and Simone Zito, were Francesco Gambino and a bartender.

The government also presented evidence of the workings of the heroin importation scheme. Several members of the conspiracy who were indicted with defendants pled guilty and testified for the government. Salvatore Allegra testified that in 1985, he was asked by Tommaso Scalici to hire

couriers to smuggle heroin into the United States. Supervised by Simone Zito, Allegra arranged for couriers who travelled to the United States from Sicily with packages of heroin hidden on their bodies. In the United States, the heroin was delivered to Salvatore Caruso, an associate of Francesco Gambino. Allegra oversaw several deliveries before he was arrested by Italian authorities in 1986.

Tony Mannino and Simone Zito also sought Kane's assistance in their cocaine distribution scheme. Salvatore Rina, a friend of Kane's who lived in Florida, had access to large amounts of cocaine. Mannino and Zito wanted Kane's help in obtaining cocaine from Rina.[2]

Timothy Zepp, another FBI informant, also testified about the conspiracy's involvement in the cocaine trade. According to Zepp, Zito sold cocaine to Enzo Varisco. Zepp was one of Varisco's customers. On one occasion, Zepp arrived at Varisco's pizzeria to pick up a cocaine delivery. Because the cocaine had not yet arrived, Varisco told Zepp to wait. Soon Simone Zito arrived, carrying a bag. After Simone and Varisco went briefly to a back room, Varisco handed Zepp his cocaine. In a later conversation with Zepp, Simone Zito revealed that he knew the price Varisco charged for the cocaine, and offered Zepp a better price.

Grace Mannino, Tony Mannino's wife, was also involved. Because Tony Mannino knew that his telephone was being tapped, the conspirators devised an elaborate system of arranging for calls to and from various public pay telephones to conduct their drug trade. Typically a conspirator

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2. The record does not reveal whether this contemplated transaction ever took place.

would call Grace Mannino and arrange for a telephone call to the "attorney's office" at a particular time. At the specified time, Simone Zito or Tony Mannino would be observed by government agents picking up a pay telephone.

Many of the telephone calls by conspirators to the Mannino residence were in halting, guarded code. For example, on January 5, 1988, Grace Mannino told Giovanni Angelo Mannino, Tony Mannino's brother, to call her husband Tony "at the same place as two days ago." Later that day, Simone Zito called the Mannino residence and told Sal Mannino to "call your brother . . . not at that place where you went two days ago . . . the one before . . . be careful at what you are doing." Calls that were not so cryptic explained when Tony Mannino would arrive in Brooklyn for his frequent meetings with Francesco Gambino.

The conspirators laundered their proceeds. In 1987, Tony Mannino, Sal Mannino, Grace Mannino, and Simone Zito purchased a house to shelter their drug profits. As we have noted, in October, 1987, Simone Zito told Kane that he needed money to buy a townhouse both as an investment and as a place to cut heroin. The day after Kane delivered the $25,000 to Simone Zito and Tony Mannino, $16,000 in cash was deposited in the bank account of SNT corporation, the corporate name of a pizzeria owned and operated by the Manninos. Like the money that Kane handed Simone, the deposit contained a large number of one hundred dollar bills. The government presented evidence at trial suggesting that the remaining $9,000 was paid into the account over the next several weeks.

Two other incidents corroborate Francesco Gambino's role in the conspiracy. As we have

noted, Kane helped Stefano and Simone Zito obtain automobiles. Kane made these arrangements through Robert Reyers, who was an automobile dealer in southern New Jersey. Through these transactions, Reyers became familiar with Stefano and Simone Zito, Tony Mannino, and Enzo Varisco. Reyers testified as a witness for the government at trial. In January, 1988, Robert Reyers told Kane, Simone Zito and Tony Mannino that Reyers' wife, a court reporter in the federal courthouse in Philadelphia, could obtain names that came before a federal grand jury sitting in the Eastern District of Pennsylvania. Soon afterwards, Simone Zito gave Reyers a list of four names, with instructions to contact him immediately if any of the names came up in connection with the grand jury. Those names were Simone Zito, Tony Mannino, Domenico Mannino, and Francesco Gambino.

The second incident was recounted by Simone Ricupa, a former heroin dealer in New York City. One day in 1985, Ricupa was told by his supplier, Sal DiMaggio, that DiMaggio's supplier needed as much money as possible to send to Italy as soon as possible. Ricupa gathered about $100,000 from some of his dealers, placed it in a paper bag and, as instructed, delivered the money to DiMaggio's restaurant. When he arrived at the restaurant, Ricupa saw Francesco Gambino sitting in a car parked near the restaurant. Ricupa and DiMaggio went into the restaurant and DiMaggio went to an apartment upstairs. While waiting, Ricupa could see Gambino from his vantage point in the restaurant. DiMaggio returned downstairs with two large shopping bags, which he carried out to Gambino's car. After a quick discussion with

Gambino, DiMaggio placed the bags in the car, and Gambino drove away.

On July 26, 1988, the FBI searched an apartment in Brooklyn, New York that was rented in the name of Salvatore Inzerillo. Prior to this search, Inzerillo, Simone Zito, and Tony Mannino had been seen going to and from the apartment. The search turned up a sample quantity of heroin and approximately $12,000 in cash. Reyers testified that after the search, Simone Zito said that if the search had taken place a day later "they would have caught us with four kilos of heroin."

As we have noted, following trial, Francesco Gambino, Tony Mannino, Sal Mannino, and Grace Mannino were convicted of conspiring to import and distribute heroin, Sal and Grace Mannino were convicted of money laundering, and Enzo Varisco was convicted of conspiring to distribute cocaine. The townhouse was forfeited to the United States government pursuant to 21 U.S.C. § 853.[3]

All of the defendants appeal on various grounds. For the reasons discussed below, we will affirm the district court.

II. Co-conspirator Hearsay

Kane's recounting of Tony Mannino's assertion that he and Simone Zito worked for Francesco Gambino was one of the most compelling pieces of evidence offered against Gambino. Federal Rule of Evidence 801(d)(2)(E) exempts from the hearsay rule "a statement by a coconspirator of a party during the course of and in furtherance of the

3. Francesco Gambino was sentenced to thirty years' imprisonment, Tony Mannino, 27 years' imprisonment, Sal Mannino, 18 years' imprisonment, Enzo Varisco, 15 years' imprisonment, and Grace Mannino, one year and one day in prison.

conspiracy." In determining whether the co-conspirator exception applies in a particular case, the trial court must determine, by a preponderance of the evidence, that there was a conspiracy between the declarant and the party against whom the evidence is offered; and that the hearsay statements sought to be admitted were made during the course of the conspiracy and in furtherance of its goals. *Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987). Gambino contends that there was insufficient evidence of his participation in the conspiracy, and also that the hearsay statement should not have been admitted subject to later connection.

A.

Specifically, Gambino alleges that it was error for the district court to admit the hearsay statements prior to determining their admissibility. We begin with the observation that "the control of the order of proof at trial is a matter committed to the discretion of the trial judge." *United States v. Continental Group, Inc.*, 603 F.2d 444, 456 (3d Cir. 1979), *cert. denied*, 444 U.S. 1032 (1980); *see also United States v. Ammar*, 714 F.2d 238, 245-47 (3d Cir.) (upholding admission of co-conspirator statements subject to later connection), *cert. denied*, 464 U.S. 936 (1983); *In re Fine Paper Antitrust Litigation*, 685 F.2d 810, 820-21 (3d Cir. 1982) (holding that *Continental Group* permitted, but did not require, admission of co-conspirators' hearsay statements subject to later connection), *cert. denied*, 459 U.S. 1156 (1983). We review for abuse of discretion. *Ammar*, 714 F.2d at 247.[4]

4. We have not been able to find in the record a timely objection. Gambino did not object when the challenged statement was elicited from Kane at trial. On appeal, Gambino asserts that he objected to the statement in several pretrial

There is a danger that if hearsay statements of an alleged co-conspirator are admitted subject to later connection, the court may determine at the close of evidence that the offering party did not meet its burden of establishing a conspiracy and the jury would be irremediably prejudiced. Therefore we have counseled that the practice of admitting co-conspirator hearsay statements subject to later connection "be carefully considered and sparingly utilized by the district courts." *Continental Group*, 603 F.2d at 457.

At the same time, we have consistently recognized that "the order-of-proof problem confronting the trial judge is a particularly difficult one where the government is attempting to prove the participation of multiple defendants in a continuing conspiracy." *Id.* at 456 (quoting *United States v. American Radiator & Standard Sanitary Corp.*, 433 F.2d 174, 195 (3d Cir. 1970) (upholding the district court's decision to admit co-conspirator statements subject to later connection)). In *Continental Group*, we upheld the district court's decision to admit co-conspirator hearsay subject to later connection because "given the large amount of interrelated testimony to be considered in this case, we believe that alternative approaches may have been unduly complex and confusing to the jury or to the court." *Id.* at 457. Similar difficulties confront the trial judge in many large-scale conspiracy cases.

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motions, and provides three citations to the record. We have examined his citations, but none of the cited materials raise this objection. Gambino also asserts that the defendants repeatedly requested findings on the admissibility of co-conspirator statements during trial, but offers no record citations. Therefore we could review this, and the other challenges to the admission of Kane's statement that he worked for Gambino, under a plain error standard.

This case is no exception. The government's proof consisted of a large amount of interrelated testimony. Except for Kane, most of the government's witnesses testified only to discrete corners of the conspiracy. Only Kane provided a common thread linking virtually all the conspiracy's actions. Therefore the conspiracy became clearly defined only after the testimony of several witnesses. For these reasons, we find that the district court's decision to admit the testimony subject to later connection was not an abuse of discretion.

B.

Gambino also contends that timing aside, the government did not adequately establish his connection to the conspiracy. As we have noted, the trial court must determine, by a preponderance of the evidence, whether the defendant and the declarant were members of the alleged conspiracy, and whether the hearsay statements were made during the course of the conspiracy and in furtherance of its goals. *Bourjaily*, 483 U.S. at 175-76 (1987). Before the adoption of Fed. R. Evid. 104(a), proof of a conspiracy required evidence external to the hearsay statement itself. This rule was premised on the belief that a statement should not be able to "lift itself by its own bootstraps to the level of competent evidence." *Glasser v. United States*, 315 U.S. 60, 75 (1942). *Bourjaily* made clear, however, that the adoption of Fed. R. Evid. 104(a) changed the earlier rule, and that the co-conspirator's hearsay statement could be used to establish the existence of a conspiracy.

In *Bourjaily*, the Court expressly declined to decide whether a trial court could rely "solely upon [the declarant's] hearsay statements to determine

that a conspiracy had been established by a preponderance of the evidence." *Bourjaily*, 483 U.S. at 181. Here there is sufficient evidence external to the hearsay statement itself, so we need not address that issue today.[5]

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5. We note that every United States court of appeals that has addressed this issue has required some independent evidence. The pre-*Bourjaily* requirement of proof *aliunde* was premised on the presumptive unreliability of co-conspirator hearsay. *See* 483 U.S. at 179; Davenport, *The Confrontation Clause and the Co-Conspirator Exception in Criminal Prosecutions: A Functional Analysis*, 85 Harv. L. Rev. 1378, 1387 (1972) (coconspirator statements may suffer from "exclusively self-serving motives and possibly faulty memories"); Levie, *Hearsay and Conspiracy: A Reexamination of the Co-Conspirators' Exception to the Hearsay Rule*, 52 Mich. L. Rev. 1159, 1165-66 (1954) ("The conspirator's interest is likely to lie in misleading the listener into believing the conspiracy stronger with more members (and different members) and other aims than in fact it has.").

The Court did not alter that presumption, but held that the ways in which it could be rebutted had been expanded by the adoption of Fed. R. Evid. 104(a). "[A] piece of evidence, unreliable in isolation, may become quite probative *when corroborated by other evidence*. . . . [T]rial courts must be permitted to evaluate these statements for their evidentiary worth as revealed by the particular circumstances of the case." 483 U.S. at 180 (emphasis added). In the absence of any evidence to the contrary, however, the presumption of unreliability controls; and the hearsay statement cannot serve as the basis for establishing the declarant's connection to the conspiracy. *United States v. Garbett*, 867 F.2d 1132, 1134 (8th Cir. 1989) ("It is generally agreed that 'an otherwise inadmissible hearsay statement cannot provide the sole evidentiary support for its own admissibility.'") (quoting *Bourjaily*, 483 U.S. at 184 (Stevens, J., concurring)); *United States v. Silverman*, 861 F.2d 571, 577 (9th Cir. 1988) ("[A] co-conspirator's out-of-court statement, standing alone, is insufficient to establish that the defendant had knowledge of and participated in a particular conspiracy."); *United States v. Gordon*, 844 F.2d 1397, 1402 (9th Cir. 1988) ("[T]here must be some evidence, aside from the proffered statements, of the

The district court assumed a need for some external evidence, and found that Gambino was a member of the conspiracy, and that the hearsay statement to Kane was made during the course of and in furtherance of that conspiracy. We review the district court's determination under a clearly erroneous standard. *United States v. Cruz*, 910 F.2d 1072, 1081 n.11 (3d Cir. 1990), *cert. denied*, __ U.S. __, 111 S.Ct. 709 (1991).

The following independent evidence indicates that Gambino was involved in the conspiracy to import and distribute narcotics. First, there is the March, 1988 discussion in the Cafe Giardino between Kane and Simone Zito. After some bickering about the price of heroin, Simone Zito left for another area of the cafe, and upon returning Zito told Kane that the price was negotiable, and that he could have a sample of the heroin. Shortly thereafter, Kane observed that Francesco Gambino and a bartender were the only other people in the cafe. It was a permissible inference that Zito went to Gambino for authority to negotiate price.

Francesco Gambino was also strongly implicated through the compromise of confidential grand jury proceedings. Simone Zito provided Reyers with a list of four names, and asked Kane to inform him if any of the names were mentioned in grand jury proceedings. Gambino's name was on that list, along with the names of Simone Zito, Tony Mannino, and fugitive codefendant Domenico

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existence of the conspiracy and the defendant's involvement."); *United States v. Zambrana*, 841 F.2d 1320, 1344-45 (7th Cir. 1988) (observing that some independent evidence is necessary); *United States v. Daly*, 842 F.2d 1380, 1386 (2d Cir.) (assuming that some independent evidence is necessary), *cert. denied*, 488 U.S. 821 (1988).

Mannino. It was a permissible inference that these individuals were linked in the drug trade.

Filippo Ricupa's testimony also tied Gambino to the conspiracy. In the 1985 money drop described in Part I, Gambino was in a car in front of the restaurant, and received the bags that DiMaggio brought downstairs. Furthermore, electronic surveillance revealed regular telephone calls between Gambino and Tony and Grace Mannino, many of which involved when Tony Mannino would arrive in Brooklyn for his frequent meetings with Gambino. When viewed in light of the other evidence they corroborate Gambino's involvement.

Finally, a series of FBI surveillance photographs showed Gambino in the presence of many of the co-conspirators, in particular Tony Mannino and Simone Zito, during "key periods of the conspiracy." *United States v. Gambino*, 728 F. Supp. 1150, 1155 (E.D. Pa. 1989). Mere association "cannot alone support a conviction for conspiracy. *United States v. Torres*, 519 F.2d 723, 725-26 (2d Cir.), *cert. denied*, 423 U.S. 1019 (1975). On the other hand, the timing and circumstances of a meeting or series of meetings may be sufficiently suspicious to permit a reasonable inference of complicity in the criminal enterprise." *United States v. Ammar*, 714 F.2d 238, 250 (3d Cir. 1983). In *Ammar*, we held that evidence of repeated meetings with other members of the conspiracy coinciding with heroin importations appropriately could be considered in determining whether the co-conspirator exception to the hearsay rule was applicable. Here, also, consideration of the photographs was appropriate.

To this evidence we now add the hearsay statement sought to be admitted. According to Kane, Tony Mannino directly asserted to Kane that

Gambino was Mannino's and Zito's boss in the drug trade. The district court, which heard the testimony, concluded that all of this evidence, taken together, established by a preponderance of the evidence Tony Mannino and Simone Zito's membership in a conspiracy with Gambino. This determination was not clearly erroneous.

III.

All of the defendants challenge the admission and use of several witnesses' guilty pleas.

A.

At trial, the government presented several witnesses who were co-conspirators and who had pled guilty. While on the stand, the government elicited testimony about their guilty pleas. Defendants contend that these references to the co-conspirators' guilt were prejudicial and deprived them of a fair trial.

Defendants did not object during the witnesses' testimony. Therefore, we review this matter under a plain error standard. *See* Fed. R. Evid. 103(a)(1) (requiring a "timely objection . . . stating the specific ground of objection, if the specific ground was not apparent from the context"); *United States v. Pungitore*, 910 F.2d 1084, 1125-26 (3d Cir. 1990) (reviewing for plain error statements to which defendants did not object), *petition for cert. filed*, Dec. 6, 1990 (No. 90-6472).[6] Under the plain

6. Some of the testimony was objected to on other grounds. For example, defendants objected to the admission of Zepp's guilty plea on the ground that Zepp's discussion of the plea agreement included a reference to the protection the government was providing him. That did not preserve the objection that is currently before us. *See, e.g., United States v. Field*, 875 F.2d 130, 134 (7th Cir. 1989) ("Neither a general objection to the evidence nor a specific objection on other grounds will preserve [an] issue on review.").

error standard (Fed. R. Crim. P. 52(b)), we can correct "'only particularly egregious errors, those errors that seriously affect the fairness, integrity or public reputation of judicial proceedings.'" *United States v. Thame*, 846 F.2d 200, 204 (3d Cir.) (quoting *United States v. Young*, 470 U.S. 1 (1985)), *cert. denied*, 488 U.S. 928 (1988).

There are strong considerations against using a co-conspirator's guilt as substantive evidence of another defendant's guilt. "The foundation of [this] policy is the right of every defendant to stand or fall with the proof of the charge made against him, not against somebody else. . . . The defendant ha[s] a right to have his guilt or innocence determined by the evidence presented against him, not by what has happened with regard to a criminal prosecution against someone else." *Bisaccia v. Attorney General of New Jersey*, 623 F.2d 307, 312 (3d Cir.) (quoting *United States v. Toner*, 173 F.2d 140, 142 (3d Cir. 1949)), *cert. denied*, 449 U.S. 1042 (1980). In *Bisaccia*, a *habeas corpus* proceeding, we held that a prosecutor's use of a co-conspirator's guilty plea to establish another defendant's guilt was error, and remanded for a determination of whether the error was harmless.

This specter is not implicated when a guilty plea is introduced not to establish a co-conspirator's guilt, but for some valid purpose. For example, in *United States v. Inadi*, 790 F.2d 383, 384 n.2 (3d Cir. 1986), we upheld the admission of a co-conspirator's guilty plea "in order to rebut defense counsel's persistent attempts on cross-examination to raise an inference that the co-conspirators had not been prosecuted, and that Inadi was being singled out for prosecution."

In any criminal trial, the credibility of the prosecution's witnesses is central. By eliciting the witness' guilty plea on direct examination, the government dampens attacks on credibility, and forecloses any suggestion that it was concealing evidence. Such disclosure is appropriate. *See United States v. Casto*, 889 F.2d 562, 567 (5th Cir. 1989) ("Because it was reasonable for the prosecution here to believe that [defendant's] counsel would attempt to impeach [a testifying co-conspirator's] implicating testimony by questioning her about her guilty plea, it was also reasonable for the prosecutor to adduce this fact during her opening examination of [the testifying co-conspirator]."), *cert. denied*, __ U.S. __, 110 S. Ct. 1164 (1990); *United States v. Dworken*, 855 F.2d 12, 30 (1st Cir. 1988) ("[T]he fact of [a] guilty plea and the plea agreement properly may be elicited to dampen the effect of an anticipated attack on the witness' credibility."); *United States v. Louis*, 814 F.2d 852, 856 (2d Cir. 1987) ("Proper purposes [for co-conspirators' guilty pleas] include disclosure of matters damaging to the credibility of a witness and contradiction of any inference that the government is concealing a witness' bias."); *see also* 2 J. Weinstein & M. Berger, *Evidence* ¶ 410[07], at n. 3 (1990) (If a co-offender who appears as a witness has pled guilty, "the trier must know about the plea's existence in order to evaluate the witness' testimony."). In this case, the defendants began their attack on the credibility of the government's witnesses in their opening statements to the jury. Yet even in the absence of this attack, the elicited testimony was proper here.

At the same time, it is important that the jury understand the limited purposes of a

co-conspirator's guilty plea. Here, in its final charge, the district court properly instructed the jury that the guilt of any one person was not substantive evidence of the guilt of any other person. We also note that the guilty pleas were not emphasized by the prosecutor during direct examination, and were not inappropriately emphasized during closing argument. We believe that the appropriate uses of the pleas were clear. The references to the pleas were not an abuse of discretion, let alone plain error.

B.

Defendants level a special attack on the testimony of Robert Reyers. He started the trial as a defendant but pled guilty on the twelfth of twenty-six days of trial and became a witness for the prosecution. During the government's case in chief, Reyers corroborated some of Kane's testimony through his own recollection of events, and also testified that Kane had told him about many of the incidents Kane mentioned at trial.

Defendants timely objected to Reyers' testimony on the grounds that it would impermissibly suggest the guilt of the remaining defendants. We review the district court's decision to admit Reyers' testimony for abuse of discretion. *See United States v. Pungitore*, 910 F.2d 1084, 1151 (3d Cir. 1990), *petition for cert. filed*, Dec. 6, 1990 (No. 90-6472).[7]

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7. Defendants raise two further objections to Reyers' testimony. First, they contend that the district court should have declared a mistrial even before the jury was apprised of Reyers' plea during his testimony, because the mere fact of his disappearance strongly implied his guilt, and in turn implicated the other defendants. Any such inference was foreclosed by the court's clear instruction to the jurors,

As we have noted, guilty pleas are properly elicited on direct examination to dampen subsequent attacks on credibility, and to foreclose any suggestion that the party producing the witness was concealing evidence. That conclusion applies equally to Reyers' testimony. Reyers' relationships with the remaining defendants could have created the possibility for the prejudice that we warned of in *Bisaccia*. Here, the district court avoided those dangers. As we have noted, the district court properly instructed the jury on the appropriate uses of guilty pleas, and as with the guilty pleas of the other co-conspirators, Reyers' guilty plea was not emphasized by the prosecutor during direct examination, and was not inappropriately emphasized during closing argument. We believe that the appropriate uses of Reyers' plea were clear, and that the district court's decision to admit Reyers' testimony and to allow mention of his guilty plea was not an abuse of discretion.

This case is factually similar to *United States v. Kilrain*, 566 F.2d 979 (5th Cir. 1978), *cert. denied*, 439 U.S. 819 (1978). In that case, one of the defendants pled guilty in the middle of trial and became a government witness. The remaining defendants, who were convicted, contended that the defendant who pled guilty had been privy to their defense strategy, and therefore they were

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immediately after they entered the courtroom on the first day following Reyers' plea, that they were not to infer anything from Reyers' absence. At that point in the trial, we find no prejudice to the other defendants. Second, defendants contend that Reyers' testimony impermissibly bolstered Kane's credibility as a witness, because the jury might infer that Kane's testimony was one of the reasons Reyers pled guilty. We deal with this objection below.

deprived of a fair trial. The Court of Appeals for the Fifth Circuit upheld the convictions, observing that the remaining defendants needed to demonstrate some "actual prejudice resulting from [the witness'] supposed knowledge of defense strategy, or that [the witness] communicated such knowledge to the government." 566 F.2d at 983. In this case, defendants have not alleged any specific prejudice. Although the Sixth Amendment claim raised in *Kilrain* is different than the claim raised here, *Kilrain* lends support to our result today.

C.

Defendants also object to remarks made by the prosecution during closing arguments. Before discussing the challenged remarks, we must place them in context. A central focus of defendants' closing arguments — indeed much of their defense at trial — was Kane's lack of credibility. Counsel for Tony Mannino argued that "William Kane, as [the prosecution] knew before they put him on the stand, is a perjurer. Simple. He's got a history of it. . . . He told you he's a gangster, he's a wiseguy, he's a thug who goes around threatening people with a gun. . . . You decide: murderer or liar? Either way, his testimony isn't worth anything. William Kane is a cold, calculating individual who came here and lied even as we sat . . . ."

Even more telling, counsel for defendant Fodera, who was acquitted by the jury, pointedly made an issue of Reyers' lack of belief in Kane. In his closing argument, he remarked:

> This case is unique in the trials of criminal cases in that this is one of the rare instances that you

> will ever see where you will see one of the government witnesses get on the stand and say to you, as happened in this case, that another one is a liar and a perjurer. Do you remember Reyers, the fellow who used to sit in that corner over there, who pled guilty and became a government witness? Reyers testified in connection with this case, and Reyers, one of the things that he said is that Kane, when he testified in this court, lied. So, you have one witness characterizing another government witness as a perjurer.

The reference is to testimony by Reyers, elicited during cross-examination, recalling a conversation that Reyers had with Gambino's attorney before Reyers pled guilty. Reyers had told Gambino's attorney that he believed that Kane was lying on the stand. Later in his closing, counsel for Fodera again sounded this refrain:

> And Mr. Reyers, who was one of [the prosecution's] witnesses . . . said [Kane] lied on the witness stand and he was a liar, and I accuse [Kane] of being a murderer and I accuse him of being a perjurer, and I submit to you that it is not fair, it is not just, to try to convict [Fodera] solely on the testimony of a murderer, a perjurer, a robber, a burglar, a career criminal.

After these remarks, the prosecution, in its rebuttal remarks to the jury, suggested that Reyers' guilty plea belied his asserted lack of faith in the veracity of Kane's testimony.

> Now [Counsel for Tony Mannino], in talking about William Kane, told you what a liar he was, and other attorneys have. But remember this: Reyers and Joseph Cuffaro thought that he was

> such a liar that, based on his evidence against them, they pled guilty. . . . You heard Mr. Cuffaro testify that, as the result of the sale of 15 kilograms of cocaine in Florida, he was indicted, and the sale was to Bill Kane. He was indicted and he pled guilty. And you heard Mr. Reyers, that he pled guilty, and you heard during the course of this trial that the evidence against Mr. Reyers came primarily from William Kane.

Defendants timely objected to the prosecution's statements, and now contend that the reference to Reyers' and Cuffaro's guilty pleas deprived them of a fair trial. We review the district court's denial of a motion for a mistrial on these grounds for abuse of discretion. *See United States v. DiLoreto*, 888 F.2d 996 (3d Cir. 1989). We will reverse if "the prosecutor's remarks, taken in context of the trial as a whole, were sufficiently prejudicial to have deprived [defendants of their] right to a fair trial." *United States v. DiPasquale*, 740 F.2d 1282, 1297 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985).

Defendants raise two related arguments. First, they contend that the fact of Reyers' and Cuffaro's guilty pleas cannot appropriately be used to bolster Kane's credibility by suggesting that they, at least, believed Kane. Second, they argue that even if the prior guilty pleas are relevant, mentioning them warrants a mistrial because it suggests that the remaining defendants are guilty merely by virtue of their association with those who pled guilty.

At the outset, we note that the comments by the prosecutor were proper as a fair and invited response to the defendants' vehement attacks on Kane's credibility. "[P]rosecutorial comment must be examined in context." *United States v. Robinson*,

485 U.S. 25, 33 (1988). In *Robinson*, defendant's attorney had argued that the government had unfairly deprived his client, who did not testify at trial, of an opportunity to explain his actions. In his closing argument, the prosecutor commented that the defendant had the opportunity to take the stand and testify if he so desired. Defendant claimed that this reference deprived him of his right to be free from compulsory self-incrimination under the Fifth Amendment and under 18 U.S.C. § 3481 (1988). The Court rejected this claim, reasoning that the comments were a fair response to defendant's attacks. Similarly, in *United States v. Pungitore*, 910 F.2d 1084, 1120-27 (3d Cir. 1990), *petition for cert. filed*, Dec. 6, 1990 (No. 90-6472), we held that a prosecutor's summation reference to his oath of office was a proper response to a closing argument attack on the integrity of the prosecution that ranged beyond any evidence adduced at trial. *See also United States v. Arnold*, 890 F.2d 825, 830 (6th Cir. 1989) (prosecutor's mention of codefendants' guilty pleas in closing argument appropriate rehabilitation of a witness' credibility); *United States ex rel. Paxos v. Rundle*, 491 F.2d 447, 453 (3d Cir. 1974) ("'counsel does have the right to reply to an argument raised by his opposing advocate'") (quoting *United States v. Casteel*, 476 F.2d 152, 155 (10th Cir. 1973)).

The reference to Reyers' guilty plea was appropriate as a direct response to a specific argument made by the defense. *See United States v. Sanchez*, 790 F.2d 1561 (11th Cir. 1986). In *Sanchez*, defendant was convicted of money laundering. He was involved in several transactions with an investment firm established by the DEA for the purpose of investigating the

laundering of drug proceeds. Defendant attacked, on cross-examination, one of the prosecution witness' "suitability for federal investigative work." 790 F.2d at 1564. The Court of Appeals for the Eleventh Circuit upheld the admission of testimony by a DEA agent that the witness had been found reliable in other investigations, because the testimony was a direct response to the defendant's attack. *See also* Fed. R. Evid. 608; McCormick, *Evidence* § 49 (3d ed. 1984).

We note that at least one other United States Court of Appeals has found guilty pleas relevant and admissible evidence of a witness' veracity when invoked as a direct response to a specific attack. In *United States v. Martinez*, 775 F.2d 31, 36-38 (2d Cir. 1985), much of the prosecution's case turned on the testimony of one witness, who like the defendant was an inmate in a state prison. The defendant pointed out that the witness had accused other inmates and guards of committing crimes, suggesting that the witness had fabricated these accusations to curry favor with the prison administration and to procure an early release. The prosecution rejoined with testimony establishing that all of the guards accused by the witness had pled guilty. The Court of Appeals for the Second Circuit approved, holding that admission of these other guilty pleas was not an abuse of discretion. *Id.* at 38. *Cf. United States v. Lochmondy*, 890 F.2d 817, 820-22 (6th Cir. 1989) (upholding a conviction when the government had, during closing, observed that one of the prosecution's witnesses had testified in other cases that resulted in convictions); *Arnold*, 890 F.2d at 830.

In this case, defendants made an issue of Reyers' belief in Kane in closing arguments. The

reference to Reyers' plea on rebuttal was an appropriate response. Defendants never specifically made an issue of Cuffaro's belief in Kane, so we find the reference to Cuffaro's plea more troubling. Even if we were to find that this was error, however, it would be harmless, because Cuffaro did not play a central role in either the conspiracy or the government's case at trial. In contrast, the issue of Kane's credibility was constantly revisited, by all parties, throughout the twenty-six day trial. Cuffaro's guilty plea was in an unrelated proceeding, and the role Kane's testimony played in that plea was, and remains, unclear. The one reference to Cuffaro's plea was not, when "taken in context of the trial as a whole, sufficiently prejudicial to have deprived [defendants of their] right to a fair trial." *United States v. DiPasquale*, 740 F.2d 1282, 1297 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985).

It is significant that the challenged statements left undisturbed the jury's prerogative to decide all questions of credibility. If there was any ambiguity, it was cleared up in the district court's instructions, in its final charge, that evaluating the credibility of witnesses was the function of the jury. *Cf. United States v. Hilton*, 772 F.2d 783, 786 (11th Cir. 1985) ("When bolstering testimony suggests to the jury that a witness bears the responsibility for determining the truth of the evidence, admission of the testimony may constitute reversible error.") (citing *United States v. Price*, 722 F.2d 88, 90 (5th Cir. 1983)); *United States v. Murray*, 445 F.2d 1171, 1176 n.7 (3d Cir. 1971); *United States v. DiLoreto*, 888 F.2d 996, 999 (3d Cir. 1989) (prosecutorial vouching for the credibility of a witness improper).

Even if otherwise appropriate, the challenged references to guilty pleas could still constitute

reversible error if used as substantive evidence of the defendants' guilt. As we have noted, such use poses the threat that a defendant will be found guilty not on the basis of evidence against him, but on the basis of a shadow cast by cases against others. *Bisaccia v. Attorney General of New Jersey*, 623 F.2d 307, 312-13 (3d Cir.) (quoting *United States v. Toner*, 173 F.2d 140, 142 (3d Cir. 1949)), *cert. denied*, 449 U.S. 1042 (1980). Therefore we must determine whether the appropriate use of the references was sufficiently clear.

As we have noted, there was a direct nexus between Reyers' plea and the attacks on Kane's credibility. This nexus made clear that the pleas were not offered as substantive evidence of the defendants' guilt. Cuffaro's plea, also, was mentioned in response to attacks on Kane's credibility. The connection to Kane's credibility was far less direct, and therefore the purpose less clear. As we have mentioned, however, he was not centrally involved in the conspiracy in this case. His guilty plea was entered in a different proceeding, and when he described his plea to the jury he mentioned only that he had purchased cocaine from Kane, and did not mention any of the defendants. Recalling this testimony in closing argument did not imply that any of the defendants were guilty of the offenses charged in this case. Finally, any possible misunderstanding of the appropriate use of the guilty pleas was cleared up by the district court's jury instructions. The court explicitly told the jury that the guilt of any person was not evidence of any other person's guilt. Defendants did not object to this charge. We view this as adequate, because under Fed. R. Crim. P. 30, "[i]f a more specific curative instruction were thought necessary, counsel should have requested

one before the jury retired." *United States v. Thame*, 846 F.2d 200, 204 (3d Cir.), *cert. denied*, 488 U.S. 928 (1988).

For these reasons, the prosecutor's remarks did not deprive defendants of a fair trial, and the district court's denial of defendants' motion for a mistrial on this ground was not an abuse of discretion.

IV.

Defendants raise several other grounds for appeal. First, they challenge the sufficiency of the evidence supporting their convictions and the forfeiture of the house. We have reviewed the record, and find those arguments without merit. *See Burks v. United States*, 437 U.S. 1, 16 (1978); *United States v. Pungitore*, 910 F.2d 1084, 1128-29 (3d Cir. 1990), *petition for cert. filed*, Dec. 6, 1990 (No. 90-6472).

Defendants also claim that the district court improperly admitted Kane's hearsay testimony recounting matters about the conspiracy told him by Stefano Zito. Those statements were admitted under the co-conspirator exception we have already discussed. Defendants contend there was insufficient evidence establishing Stefano Zito's membership in the conspiracy; and that the statements were not in furtherance of the conspiracy. We disagree, and find those contentions without merit.

Defendants raise several other claims. They contend that: the district court's instructions to the jury were flawed; the prosecutors created or altered certain critical documents; the prosecutors improperly referred to charges pending against Simone Zito and Tony Mannino in Italy during trial; defendants were prejudiced by the handing

down of a superseding indictment six weeks prior to trial; the government failed adequately to minimize intercepted communications; the jury had available during its deliberations prejudicial tapes that had not been admitted into evidence; and the district court erroneously failed to quash a superseding indictment or order the government to provide a bill of particulars. We have considered each of these arguments and find them without merit.

For the foregoing reasons, we will affirm the judgments of sentence.

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Teste:

Clerk of the United States Court of Appeals
for the Third Circuit